BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

Docket No. 2017-292-WS – Order No. 2019-____

November ___, 2019

In Re:	)	
	)	**PROPOSED ORDER**
Application of Carolina Water Service, Inc. for Approval of an Increase in its Rates for Water and Sewer Services	)	

This matter comes before the Public Service Commission of South Carolina (the "Commission") by way of a petition for rehearing and reconsideration ("CWS Petition") filed by Carolina Water Service, Inc. ("CWS" or "Company")[1], pursuant to S.C. Code Ann. §58-5-330 and this Commission's Rules of Practice and Procedure.

BACKGROUND

This proceeding was initiated when CWS filed an application for a rate increase in November 2017. Following an evidentiary hearing in April 2018, the Commission issued Order No. 2018-345(A) granting a portion of the rate increases sought by CWS. In June 2018, the ORS filed a petition for rehearing or reconsideration asking that the Commission reconsider six specific issues ruled on in Order No. 2018-345(A). In response to the ORS petition for reconsideration, the Commission issued Order No. 2018-494 granting rehearing on four of the six issues raised by ORS, including the litigation expense issue arising from *Congaree Riverkeeper v. Carolina Water Service* federal court litigation ("*Riverkeeper*") which is the subject of the CWS Petition.

[1] CWS has recently changed its name to Blue Granite Water Company (See Docket No. 2018-365-WS), but to avoid confusion will continue to use its former name for purposes of this proceeding.

Following the rehearing, the Commission issued Order No. 2018-802. Among other rulings, Order No. 2018-802 ruled on recovery of *Riverkeeper* litigation expenses differently from the ruling on that issue in Order No. 2018-345(A). On February 14, 2019 CWS filed the CWS Petition with this Commission seeking rehearing and reconsideration of the ruling on recovery of *Riverkeeper* litigation expenses. On February 25, 2019 CWS filed a notice of intent to appeal with the South Carolina Supreme Court.

In response to the CWS Petition, the Office of Regulatory Staff ("ORS") filed a motion requesting dismissal of the CWS Petition on the grounds that it was not permitted because it followed a previous order granting rehearing and because the notice of appeal divested the Commission of jurisdiction. On March 7, 2019, the Commission issued Order No. 2019-178 dismissing the CWS Petition on the ground that the notice of appeal divested the Commission of jurisdiction. On March 22, 2019 CWS filed a motion with the Supreme Court asking that the case be remanded to this Commission for reconsideration of the CWS Petition. On May 15, 2019, the Supreme Court issued an order dismissing the CWS notice of appeal, vacating Commission Order No. 2019-178 and directing the Commission to rule on the merits of the CWS Petition. On May 21, 2019 CWS submitted a supplemental memorandum in support of the CWS Petition and to provide the Commission with additional information relevant to the issue presented in its Petition. On June 6, 2019, the ORS filed a Memorandum in Opposition to CWS Petition for Rehearing or Reconsideration ("ORS Memorandum"). CWS filed its Reply to ORS Opposition on June 14, 2019. By Order No. 2019-623 dated September 4, 2019, Commission granted rehearing on the issues raised in the CWS Petition and instructed its staff to set a date on which oral arguments were to be held. The parties appeared before the Commission and presented oral arguments on October 7, 2019.

After full consideration of the applicable law, the CWS Petition, the ORS Memorandum, the evidence represented at the September 2018 hearing, and the supplemental exhibits submitted by CWS, the Commission hereby issues its findings of fact and conclusions of law:

FINDINGS OF FACT

1. The matter before the Commission is the question of whether the CWS *Riverkeeper* litigation expenses are properly recovered from its customers as reasonably incurred business expenses.

2. The *Riverkeeper* litigation was initiated in January 2015 when the Congaree Riverkeeper brought a citizen suit against CWS in federal court under the Clean Water Act (33 U.S.C. §§1251 et seq.) ("CWA"). The primary focus of the *Riverkeeper* litigation was the assertion that CWS had violated its discharge permit by failing to interconnect its I-20 facility with the regional collection and system operated by the Town of Lexington ('the Town"). Tr., p. 170, ll. 10-14.[2] One of CWS's fundamental and primary goals in defending the *Riverkeeper* litigation was to ensure continued reliable service to customers served by the I-20 facility.

3. In 1994 CWS was issued a permit pursuant to the National Pollutant Discharge Elimination System ("NPDES") of the CWA that allowed CWS to discharge treated effluent from its I-20 wastewater treatment plant. That permit included a requirement that the I-20 facility be connected to a permanent, regional treatment facility when such a connection was "constructed and available." CWS Petition, p. 2. The question of whether a connection to the regional treatment facility was "constructed and available" was the central issue in dispute in the *Riverkeeper* litigation.

4. Notwithstanding the Town's completion of its regional line in 1999, in July of 2000, the Town entered into an enforcement agreement with the Department of Health and Environmental

[2] Transcript citations are to the transcript of the September 6, 2018 hearing in this Docket.

Control ("DHEC"), which acknowledged that the Town lacked capacity at the time to take and treat the flow from the I-20 System. This lack of treatment capacity was not remedied by the Town until 2012 when the City of Cayce's expanded regional wastewater treatment facility came on line. Tr. p. 169, ll. 10-14; Hearing Ex. 7, p. 12.

5. In 2003, this Commission denied approval of a proposed agreement for the Town to provide wholesale service to the 1-20 System. The Commission found the Town's proposed wholesale rate — which had been amended to provide a treatment rate that was then higher than that originally offered by the Town in 2000 — was unreasonably high. Subsequently, CWS's I-20 NPDES Permit was modified through a decision on administrative appeal to specifically provide that CWS was not obligated to connect unless the Town offered wholesale treatment service that the Commission would approve. Tr., p. 168, ll. 15-20.

6. Upon learning that the expansion of the Cayce regional treatment facility was nearing completion such that the Town would have adequate treatment capacity available for the I-20 System influent flow, CWS requested a connection of the I-20 System with the Town's regional line on October 5, 2011 but received no response to that request. Tr. p 169, ll. 4-7, Hg. Ex. 7 at p. 10.

7. After learning that the expansion of the Cayce treatment facility was completed in the fall of 2012, CWS again requested a connection to the Town's regional line on July 22, 2013. On this occasion, the Town did respond and on July 31, 2013, confirmed that it now had available to it adequate treatment capacity at the Cayce facility, but stated that it lacked pumping capacity in its own facilities to transport the I-20 System flow through the Town's regional line to Cayce for treatment. Tr. p. 169, ll. 8-12, Hg. Ex. 7 at p. 12.

8. The Congaree Riverkeeper did not give its 60-day notice of intent to bring a citizen suit against CWS under the Federal Clean Water Act until November 4, 2013 – several months after

CWS had sought and been denied an interconnection by the Town. Tr. p. 271, ll. 13-17. The Town refused to provide CWS with wholesale service which would have eliminated the Company's discharge from the I-20 System. Tr. p. 328, l. 22 – p. 329, l.1; p. 333, l.24 – p. 334, l.1.

9. The record before the Commission demonstrates that CWS was under an obligation to eliminate the discharge from its I-20 facility when a regional collection line was constructed and available. The record also demonstrates that from 1999 through the time that the *Riverkeeper* litigation was commenced CWS made repeated efforts to negotiate an interconnection agreement with the Town that would allow service to be provided to CWS customers at rates that would be acceptable to this Commission. Those efforts by CWS were consistent with its obligations under its DHEC-issued NPDES permit and its obligations to its customers to provide service at reasonable rates.

10. The *Riverkeeper* case has now been settled and the settlement has been approved by the Federal Court. CWS Supplemental Memorandum Exhibit 1 (Consent Order and Final Judgment) and Exhibit 2 (Final Settlement Agreement) ("Settlement").

11. The NPDES permit's requirement that CWS interconnect with a permanent, regional treatment facility required CWS to negotiate and enter into an agreement with rates and terms that were acceptable both to the Town and to this Commission. CWS never had the ability to unilaterally connect to the Town's regional collection line and when the Town refused the interconnection, it was solely within the Town's control to determine when the discharge from the I-20 would be eliminated through the Town's condemnation of the I-20 System.

12. A fundamental concern in the *Riverkeeper* litigation was that CWS customers receiving service from the I-20 wastewater treatment plant not experience any interruption in service given

the plaintiff's insistence that the discharge be enjoined and the Town's refusal to provide an interconnection to eliminate the discharge.

13. As a part of the Settlement CWS has negotiated an agreement with the Congaree Riverkeeper that addresses two similar situations. In the Settlement, the Congaree Riverkeeper agreed that it will support: (1) an effort by CWS to negotiate a wholesale agreement with the Town of Lexington to allow the closure of the Watergate treatment facility; and (2) a wholesale treatment agreement with the City of Columbia to allow the closure of the Friarsgate treatment facility. See Settlement (Exhibit 2) at pp. 2-3. The Riverkeeper also expressly agreed that, for a period of five years, it will not bring any legal action asserting any claims that CWS has failed to connect the Watergate or Friarsgate systems to a regional treatment facility. See Settlement (Exhibit 2) at pp.2-3. These terms of the Settlement will help CWS in its effort to negotiate wholesale treatment contracts with the Town of Lexington and the City of Columbia that will be beneficial to customers by obtaining treatment services on reasonable terms and by avoiding litigation.

CONCLUSIONS OF LAW

1. This matter comes before the Commission pursuant to a petition for rehearing made pursuant to the provisions of S.C. Code Ann. §58-5-330 which provides in part that:

> [i]f, after the hearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission is of the opinion that the original order or decision, or any part of it, is in any respect unjust or unwarranted or should be changed, the commission may abrogate, change or modify it and, if changed or modified, the modified order must be substituted in the place of the order originally entered and with like force and effect.

For the reasons stated in this order and pursuant to the authority granted to it by §58-5-330, this Commission determines that the portion of Order No. 2018-802 disallowing recovery of *Riverkeeper* litigation expenses should be changed and modified to allow CWS to recover those expenses.

2. Under well-established South Carolina law, "[a]lthough the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith." *Hamm v. South Carolina Public Service Commission,* 309 S.C. 282, 266, 422 S.E.2d 110, 112 (1992).

3. The record in this docket does not provide a basis for overcoming the presumption that the Company's *Riverkeeper* litigation expenses were reasonable and incurred in good faith. Instead, the record shows that CWS was at all times willing to enter into an interconnection agreement with the Town that was consistent with the ruling by this Commission in Order No. 2003-10 in which an interconnection agreement proposed by the Town was rejected because of its negative impact on CWS ratepayers.

4. The efforts of CWS in its negotiations with the Town and in its litigation of the *Riverkeeper* case were intended to benefit CWS customers by obtaining interconnection on terms that would be reasonable and appropriate and could be approved by the Commission and to ensure continuous service to customers relying on the continuous operation of the I-20 System. Tr. at pp. 167-169.

5. The efforts by CWS to obtain an interconnection agreement that would be acceptable to this Commission were supported by rulings on similar issues by the South Carolina Supreme Court. In *City of Columbia v. Board of Health and Environmental Control*, 292 S.C. 199, 355 S.E.2d 536 (1987) the Court addressed a similar impasse between a private sewer company and a municipality. In that case DHEC ordered the City of Columbia to either (1) acquire by condemnation or negotiation certain wastewater treatment facilities owned by the utility, or (2) allow the utility to interconnect its facilities to those of the City. On appeal, the Supreme Court affirmed the authority of DHEC to order Columbia to take those actions.

6. The actions of CWS in negotiating interconnection terms acceptable to this Commission are also supported by the decision of the South Carolina Supreme Court in *Midlands Utility, Inc.*

v. S.C. Department of Health and Environmental Control, 313 S.C. 210, 437 S.E.2d 120 (1993). In that case the Court considered a series of fines imposed by DHEC on the utility and held that as to certain of them DHEC could not fine the utility for permit violations that occurred during the time that Columbia was appealing the DHEC orders considered in the *City of Columbia* case. The utility made the showing that it had been unable to meet its permit limits without upgrading its facilities and that it had not been allowed to upgrade its facilities while the *City of Columbia* case was being appealed and decided. The Court found that "[b]ecause the City of Columbia, not Midlands, was the primary cause of the continued discharges at the Lincolnshire and Washington Heights systems, we hold the circuit court abused its discretion by assessing a fine against Midlands for these discharges." *Midlands Utility, supra*, 313 S.C. at 212.

7. In contrast to *State ex. rel. Utilities Comm'n v. Pub. Staff N. Carolina Utilities Comm'n*, 317 N.C. 26, 343 S.E.2d 898 (1986)—a case relied upon in our initial Order on Rehearing—the expenses in this case could not have been avoided by the utility in carrying out its responsibility of providing adequate service. Instead, the NPDES permit required CWS to negotiate and enter into an agreement with rates and terms that were acceptable both to the Town and to this Commission, a position that ultimately led to the *Riverkeeper* litigation which, among other things, threatened continuous service to CWS customers served by the I-20 System.

8. The Settlement achieved in the *Riverkeeper* litigation resulted in positive outcomes for CWS and for its customers, and the costs CWS incurred in defending the *Riverkeeper* litigation were directly related to its provision of wastewater service during the time CWS owned the I-20 System and did not result from any imprudence on the part of CWS.

For the foregoing reasons, the Commission reverses those provisions of Order No. 2018-802 holding that CWS would not be allowed to recover its *Riverkeeper* litigation expenses. Those expenses were reasonable and appropriately incurred by CWS in meeting its obligations to provide

service to its customers served by the I-20 treatment plant and ensuring service to those customers was not interrupted.

BY ORDER OF THE COMMISSION:

Comer H. "Randy" Randall, Chairman

ATTEST:

Justin T. Williams, Vice Chairman

(SEAL)